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In The

Supreme Court of the United States

October Term, 1991

THOMAS S. MACKIE, d/b/a WARWICK,

Petitioner,

v.

FDIC, As Manager of the
FSLIC RESOLUTION FUND,

Respondent.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the actions of the 101st Judicial District Court of Dallas County, Texas, the United States District Court for the Northern District of Texas, Dallas Division (Hon. Barefoot Sanders, Chief Judge) and the United States Court of Appeals for the Fifth Circuit in the trial of the case, the disposition of post-trial motions, and the entry and affirmance of the summary judgment against Petitioner, so far departed from the accepted and usual course of judicial proceedings, or sanctioned such departures, as to call for an exercise of this Court's power of supervision.

Whether the entry of judgment against Petitioner violates his rights under the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States of America by depriving Petitioner of his property without due process of law and violating his rights to a trial by a jury and to equal protection of the laws of the State of Texas and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Thomas S. Mackie, d/b/a Warwick ("Mackie"), petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

This Petition is a plea to the collective conscience of the Court. While the dispute involved is quite important to Mackie, it is not momentous in the scheme of things. However, because it is typical of thousands of cases which have been, are being and will be prosecuted as part of the savings and loan/bank failure debacle, it is a proper vehicle upon which to base the plea. Mackie can be described as regrettable but necessary collateral damage in this debacle according to the values of the executive, legislative and judicial powers which currently and in recent past have been able to control the path to be taken, the results and who has to pay for the results.

The possibility of "financial meltdown" is being flirted with dangerously. This and most of our other similar problems will not be solved unless the basic element of fairness above power becomes the controlling principle. It is easy, though wrong, to generalize that all "real estate developers" were crooked, profited unfairly, without risk -- and that all the consequences of the failed economic policies should be borne by them. If one scans the reporters, one can be remarkably accurate in predicting the prevailing party in a dispute between a debtor of a failed financial institution and the federal successor agency by merely reading the caption of the case.

Mackie realizes that his petition can be easily dismissed, without comment, or by an arsenal of precedent that can be used to justify or rationalize any desired result. But that doesn't make it right. Mackie therefore respectfully urges the Court to insist that disputes of this nature really be decided on the merits of each parties' position and in a manner which independent and objective observers would regard as fair and proper. Mackie believes that if he and others like him are given such a "level playing field" (which is the most, but also the least which they

deserve), the overall results will, in the long run, be different and better, for all concerned.

OPINIONS AND ORDERS BELOW

The Order of the Court of Appeals, dated December 10, 1991, denying Mackie's Petition for Rehearing is in App. *infra.*, at 2. The Order of the Court of Appeals, dated November 5, 1991, affirming the summary judgment against Mackie appears at App. *infra.*, at 3. The Judgment of the District Court, signed February 15, 1991, is in App. *infra.*, at 4-5. The Memorandum Opinion and Order of the District Court, dated February 15, 1991, with respect to Mackie's Motion for Reconsideration and for New Trial is in App. *infra.*, at 6-11. The District Court's Memorandum Opinion and Order, dated January 8, 1991, granting summary judgment against Mackie is in at App. *infra.*, at 12-18. The District Court's Amended Order of August 22, 1990, denying Mackie's Motion for Judgment Notwithstanding the Verdict and ostensibly granting a new trial, but continuing limitation on Mackie's rights to discovery, is in App. *infra.*, at 19-20. The State Court's Order, dated September 14, 1987, imposing discovery sanctions on Mackie, is in App. *infra.*, at 21-22. The overruling, by the State Court, of Mackie's objections to being put to trial without benefit of discovery, made at the beginning of the State Court jury trial proceedings on December 12, 1988, is in App. *infra.*, at 23-24.

JURISDICTION

The Court of Appeals entered its Order affirming the District Court's summary judgment on November 5, 1991. (App. *infra.*, 3.) On December 10, 1990, the Court of Appeals denied the

Petition for Rehearing. (App. *infra.*, 2.) Mackie invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW:

1. Killeen instituted suit in the 101st Judicial District Court, Dallas County, Texas ("State Court"), seeking to recover a "deficiency" of approximately $229,764.00, plus interest and attorney's fees, from Mackie.

2. On September 14, 1987, the State Court issued an order denying Mackie's right to conduct discovery on his counterclaims and affirmative defenses.

3. Following a jury trial in the State Court (which proceeded over Mackie's objection to being put to trial without benefit of discovery), the jury returned a verdict for the alleged deficiency amount of $277,000.00 and awarded attorney's fees of $48,000.00 plus additional attorney's fees for appeals.

4. Following the verdict in the State Court, Mackie filed a Motion for Judgment Notwithstanding the Verdict on the grounds that there was no competent evidence to support the jury's finding on the deficiency amount and, consequently, no right to recover attorney's fees either.

5. Before said Motions were ruled upon by the State Court, Killeen was placed in receivership by the FDIC and this action was removed to the United States District Court for the Northern District of Texas, Dallas Division ("District Court"), federal jurisdiction being based on 28 U.S.C. § 1346.

6. Thereafter, in the District Court, the FDIC filed a Motion for Judgment, and Mackie filed a Motion for Judgment Notwithstanding the Verdict or, Alternatively, for New Trial.

7. By Amended Order dated August 22, 1990, the District Court denied Mackie's Motion for Judgment Notwithstanding the Verdict, denied the FDIC's Motion for Judgment, and granted Mackie's Motion for New Trial, but with restricted discovery.

8. On October 9, 1990, the FDIC filed its Motion for Summary Judgment, to which Mackie filed his Response on December 14, 1990.

9. On January 8, 1991, the District Court issued its Memorandum Opinion and Order granting the FDIC's Motion for Summary Judgment and directing the FDIC to propose a judgment regarding attorney's fees and the correct calculation of interest, and thus the deficiency claimed.

10. On February 8, 1991, Mackie filed his Motion for Reconsideration of the District Court's Memorandum Opinion and Order of January 8, 1991 and for New Trial.

11. On February 15, 1991, the District Court issued its Memorandum Opinion and Order and its Judgment. Said Judgment granted the FDIC judgment for $384,879.79 and awarded attorney's fees of $76,440.75.

12. On March 15, 1991, Mackie filed his Notice of Appeal.

13. On November 4, 1991, the Court of Appeals heard oral arguments in this case. On November 5, 1991, the Court of Appeals entered its Order affirming, without opinion, the actions of the District Court.

14. On November 19, 1991, Mackie filed his Petition for Rehearing in the Court of Appeals.

15. On December 10, 1991, the Court of Appeals entered its Order denying Mackie's Petition for Rehearing.

B. STATEMENT OF FACTS

1. Mackie purchased a piece of real property on April 30, 1985 for $1,759,000.00 (plus fees to Killeen).

2. Mackie borrowed $1,388,926.00 from Killeen.

3. Following acquisition of the property, Mackie had the same rezoned to create Planned Development District Zoning.

4. Mackie defaulted in the payment of the note and the property was posted for foreclosure.

5. At the time of foreclosure, Mackie's investment in the property was $623,760.00.

6. On the foreclosure date, the amount of "hard dollars" (excluding interest and loan fees) invested in said property was $1,871,236.00.

7. At the foreclosure sale, Killeen, the predecessor of the FDIC, purchased the property for $1,312,500.00, which was approximately 75% of the appraised value of said property as reflected on the books and records of Killeen (Killeen's REO Foreclosure Sheet).

8. At the foreclosure, Mackie tendered an appraisal showing the value of the property to be $1,940,000.00.

SUMMARY OF THE ARGUMENTS FOR GRANTING THE WRIT

Mackie contends that, as a result of a series of actions by: (i) his original land acquisition lender (Killeen), as perpetuated by its successor (FDIC); (ii) the State Court in which this action was originally filed and tried to a jury verdict; (iii) the District Court to which this action was removed while Mackie's Motion for Judgment Notwithstanding the Verdict and Killeen's Motion for Judgment were pending; and (iv) the Court of Appeals which affirmed the District Court's judgment following an apparently

less than meaningful understanding and consideration of Mackie's contentions: he has had a judgment unfairly entered against him for an alleged deficiency created by the foreclosure sale (which, in fact, creates a windfall for the FDIC), and has been charged with an award of attorney's fees which is unreasonable and excessive under the circumstances presented.

In this connection, Mackie contends that the State Court abused its discretion when it denied Mackie the right to conduct discovery on his counterclaim and affirmative defense of offset, which sanction the State Court imposed and continued in force because of Mackie's failure to timely comply with one of Killeen's discovery requests. This sanction was continued despite: (i) the fact that Mackie's then-counsel advised the State Court that the failure to timely comply with the Killeen's discovery request was his fault, rather than Mackie's; (ii) Mackie's completion of compliance with the discovery request more than a year prior to the trial of this action in the State Court; (iii) Mackie's payment of all fees assessed against him by the State Court; and (iv) Mackie's objection to being put to trial without benefit of the above described and desired discovery.

The unfair treatment afforded Mackie by the State Court is further demonstrated by the following actions of the State Court during the trial of this action: (i) allowing Killeen to introduce incompetent evidence on an essential element of its case against Mackie (the proper interest rate to be used and proper amount owing by Mackie on the subject promissory note), despite repeated objections by Mackie and the refusal of Killeen's counsel to cure said deficiency notwithstanding the opportunity to do so; (ii) overruling Mackie's Motion for Directed Verdict despite the fact that Killeen had failed to establish an essential element of its case; and (iii) refusing to allow Mackie to

introduce evidence of the fair market value of the subject property at the date of foreclosure.

Mackie further contends that, despite recognizing the State Court's error, the District Court improperly denied Mackie's Motion for Judgment Notwithstanding the Verdict and, while granting Mackie's alternative request for relief, a new trial, did so in name only because it only reopened discovery for the purpose of allowing the FDIC the opportunity to correct the error committed by its predecessor in the State Court and invited the FDIC to file, following the expiration of said additional "discovery period", a Motion for Summary Judgment. The FDIC filed such a motion, again setting forth improper evidence concerning the amount owing under the note. The District Court allowed the FDIC yet another opportunity to correct this deficiency and then (i) awarded it the full amount claimed as a deficiency; and (ii) awarded the full amount claimed for attorney's fees for the services of Killeen's attorneys and the duplicative services of the FDIC's new attorneys. This award was made despite the fact that Mackie had submitted controverting Affidavits: (i) challenging the reasonableness and necessity of specified services; and (ii) questioning the propriety of charging Mackie with services that were duplicative, required to correct the FDIC's own errors, or expended in an unsuccessful attempt to persuade the District Court that Mackie was not entitled to a new trial.

Finally, Mackie contends that the District Court erred in failing to recognize as material facts (i) the failure of Killeen (and the FDIC) to credit the fair market value of the property received on foreclosure against the amount owing by Mackie; or (ii) that the circumstances surrounding the foreclosure sale were unfair and thus contributed to the property being sold by Killeen to itself at an unfair price.

As a result of the above, Mackie has been denied the benefit of his Motion for Directed Verdict, which should have been granted, denied an opportunity to conduct full discovery, and denied a jury trial on issues which he has raised by competent summary judgment proof, and thus has been unfairly deprived of property without due process of law, and been denied the equal protection of the laws of the State of Texas and of the United States of America.

REASONS FOR GRANTING THE WRIT

I. THE ACTIONS OF THE COURTS BELOW SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. THE ACTIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DEMONSTRATE THAT PETITIONER'S APPEAL OF THE SUMMARY JUDGMENT ENTERED AGAINST HIM DID NOT RECEIVE MEANINGFUL APPELLATE REVIEW.

1. The Court's actions at oral argument disclosed a lack of awareness of or understanding of the principal arguments which were clearly set forth in Petitioner's brief.

Mackie's concern that his arguments were not fairly reviewed by the Court of Appeals is based, in part, on the Panel's questions and statements at oral argument:

a. Although over 10 pages in Mackie's initial brief and 20 pages in his reply brief were devoted to this point, the Panel's questions evidenced no awareness that Mackie was complaining about the effect of the District Court compounding and continuing in force improper actions taken by the State Court prior to removal.

b. Although 10 pages of Mackie's initial brief and 9 pages of his reply brief set forth a detailed analysis of the factors which

distinguished his case from the Fifth Circuit's decision in *Savers Fed. Sav. & Loan Ass'n v. Reetz*, 888 F.2d 1497 (5th Cir. 1989) again, questions from the Panel evidenced no awareness that any argument of such distinctions was being urged.

c. Finally, the Panel's endorsement of the notions that everyone knows that [all] properties were over-appraised in the relevant period and fair market value is [always] correctly established by a foreclosure bid which is substantially less than the value shown by the lender's own contemporaneous records, strengthens Mackie's belief that his claims were being judged on the basis of general "conventional wisdom" and a political agenda, rather than on the individual merits of his case.

2. The Court's affirmance, without opinion, apparently without further consideration of Petitioner's arguments in light of misperceptions of the Court revealed at oral argument, suggests that Petitioner's claims were not decided on the merits, but were disposed of as part of a clear pattern of unequal treatment of debtors of failed financial institutions in suits involving successor federal regulatory agencies.

With respect, the Court of Appeals' affirmance of the District Court's action, in toto, without opinion, by order issued the day after the oral argument, raises, in Mackie's view, the appearance that this case was decided on the basis of the identity of the parties and non-critical, stereotypical assumptions about the merits of a borrower's claims in "another note case."

Although perhaps not generally known at this time, the FDIC and RTC have, according to the approximately 100 decisions of the Fifth Circuit involving claims of those parties for the years 1989, 1990 and 1991 (see App. *infra*., at 25-32), had the good fortune, at just the appellate level, of being correct at least 80% of the time (see App. *infra*., at 33-35 for cases decided adversely to claims of the FDIC or RTC), a rather remarkable record,

particularly in view of the distinctly different picture of these agencies' efficiency, correctness and fairness in handling their "bail out duties" which emerges from virtually every source other than the judicial opinions and decisions. This success rate would have been even higher, or perhaps unblemished, but for the fact that virtually all of the 11 "adverse decisions" which Mackie has been able to identify presented questions which did not permit any exercise of judicial discretion (see App. *infra*., at 33-35).

B. THE DISTRICT COURT DENIED PETITIONER'S RIGHTS TO A FAIR TRIAL AND A JURY TRIAL BY:

1. Ruling that, under Texas Law, the fair market value of foreclosed real estate collateral need not be credited against amount owing under real estate note.

Mackie acknowledges that there are many Texas and federal cases which require a showing of more than a mere inadequacy in the foreclosure sale price in order to avoid the use of the same as a basis for a deficiency action. *Savers Federal Savings & Loan Assoc. v. Reetz*, 888 F.2d 1497, 1506, 1508 (5th Cir. 1989) cites three Texas Supreme Court decisions as controlling on this question: (a) *American Savings & Loan Assoc. of Houston v. Musick*, 531 S.W.2d 581 (Tex. 1975); (b) *Tarrant Savings Assoc. v. Lucky Homes*, Inc., 390 S.W.2d 473 (Tex. 1965); and (c) *Maupin v. Chaney*, 163 S.W.2d 380 (Tex. 1942).

(a) *American Savings* was a trespass to try title case which relied on *Tarrant Savings* and *Sparkman v. McWhirter*, 263 S.W.2d 832 (Tex. Civ. App. -- Dallas 1953, writ ref'd), the latter of which was a trespass to try title case. The court in *American Savings* held that "mere inadequacy of

consideration is not grounds for setting aside a trustee's sale if the sale was legally and fairly made." 531 S.W.2d at 587.

(b) *Tarrant Savings* held there was insufficient evidence to establish an irregularity to void the sale. However, the court affirmed, without any negative comment, the trial court's action of submitting to the jury the market value of the property at the time of foreclosure.

(c) *Maupin* did not present the inadequate sales price question, making its comments on that question essentially *dicta*. In remanding to determine the legality of the sale, it noted, if the sale was not proper, credit should be allowed for the value of the property foreclosed upon.

The weakness of the "Texas judicial authority" used by the Fifth Circuit in *Savers* to support its conclusion that mere inadequacy of the foreclosure sale price is no impediment to a suit on a deficiency is further revealed by the following analysis of the other leading Texas cases which underlie the decisions in *American Savings, Tarrant Savings* and *Maupin*:

(a) *Allen v. Pierson*, 60 Tex. 604, 605 (1884), a seminal case - was a suit to set aside a sheriff's sale. The Court held:

> [U]nder our system it is a question of fact to be determined from the evidence whether or not the irregularity had any influence upon the consideration for which the property was sold. It is not a matter of law to be assumed by the Court. 60 Tex. 607.

The Court then reversed the case and remanded to submit that question to jury.

(b) *Tarrant Savings* cites *Burnette v. Realty Trust Co.*, 74 S.W.2d 536 (Tex. Civ. App. - Dallas 1934, writ ref'd) (a suit to cancel a trustee's deed) as its only authority for the oft quoted passage:

> Mere inadequacy of consideration alone does not render a foreclosure sale void if the sale was legally and fairly made. (390 S.W.2d 473) (Emphasis added).

The above quote is actually from *Burnette*. In *Burnette*, the court acknowledged that inadequacy of foreclosure sales price was not the primary issue in the case and that the primary issue was whether the debt was usurious. 74 S.W.2d 538.

(c) *Burnette*, in turn relied on two cases:

(i) *Bordages v. Higgins*, 19 S.W. 446, 20 S.W. 184 (Tex. 1892) which was suit to set aside a sheriff's sale foreclosing a tax lien. Inadequacy of the price was a factor that convinced the court to remand the case for a new trial.

(ii) *Spiller v. Bell*, 55 S.W.2d 634 (Tex. Civ. App. -- Galveston 1932, writ dism'd), also a trespass to try title suit.

While there are other, more recent Texas Court of Appeals' cases that support the proposition that mere inadequacy of price alone may be sufficient under certain circumstances to preclude a deficiency action (*see Olney Savings & Loan Assoc. v. Farmers Market of Odessa*, 764 S.W.2d 869 [Tex. Civ. App. -- El Paso 1989, writ den.]; *Halter v. Allied Merchants Bank*, 751 S.W.2d 286 [Tex. Civ. App. -- Beaumont 1988, writ den.] and *Lee v. Sabine Bank*, 708 S.W.2d 582 [Tex. Civ. App. -- Beaumont 1986, writ ref'd n.r.e.]) Mackie recognizes that these cases were criticized by the Fifth Circuit in *Savers* as being *dicta*. However, as noted above, all of the cases cited by *Savers* either involved trespass to try title suits, relied on a case which was a trespass to try title case (as opposed to suits on deficiency), or did not directly present any evidence of alleged inadequate sales price, therefore making their pronouncements concerning the proper standard to avoid use of a trustee's sale foreclosure price as a basis for a deficiency action essentially *dicta* also.

Notwithstanding the same, it is Mackie's position that the above and hereafter described circumstances raise a fact issue as to the fairness of the foreclosure sale conducted in this action and the propriety of the Killeen's use of the foreclosure sales price as a basis for its deficiency, particularly in light of evidence which raises an issue as to Killeen's valuation of the property on its books and records:

At the time Killeen purchased the property at foreclosure:

(a) it was of the belief that the property was worth as much or more than the debt owing against the property;

(b) it carried the property on its books at a value greater than the amount shown on its books for the amount of the debt, and this value, as represented on its books and records, was required by applicable laws and regulations to be correct and was used as part of a compliance system that determined the extent of financial requirements Killeen had to meet to stay in business;

(c) it was willing to pay up to the amount it had calculated as the indebtedness if required by competing bids to keep the property, but intended to, and did bid an amount which it believed to be no more than 75% of the value of said property, as shown on its books and records and which was substantially less than the amount of the debt, in the event no competing bids were made;

(d) its planned course of action as to the amount due on the debt was based on an erroneous calculation of the amount due on the debt and contributed to an unfair and inadequate sale price;

(e) it was tendered at the foreclosure sale an appraisal (from a source Killeen had accepted on several occasions during the course of the loan) which showed the value of the

property to be 47% greater than the amount bid by Killeen in its purchase of the property.

In the State Court Trial: (a) Mackie was not allowed to present evidence to the jury concerning the market value of the property at the time of foreclosure; (b) the evidence which Mackie was able to present was limited to that which his counsel was able to obtain from a review of certain records tendered at the commencement of Killeen's presentation of its case, and from an examination of an officer of Killeen who was not the person who negotiated and was primarily responsible for the loan; (c) Killeen, by contrast, was allowed to introduce inadmissible evidence regarding the amount of the debt, which evidence was further admitted by Killeen's own witness to have been calculated pursuant to a provision in the Note which was known by said witness to be in error.

Having said all of this, *American Savings* and *Tarrant Savings* both refer to the requirement of a fair sale and the latest of the three cases relied on by the Fifth Circuit in *Savers* (*American Savings*, 1975) says only a "slight" irregularity need be shown. 531 S.W.2d at 587.

Finally, the recent amendment to Chapter 51, Property Code of Texas (Section 51.003) (App. *infra.*, at 36-37) makes clear that the rule suggested by the Texas cases (*Olney, Halter* and *Lee*) rejected by ~~the~~ Fifth Circuit in *Savers* -- that inadequate and unrealistic foreclosure prices may not be used as a basis for a deficiency action -- has now been codified by the Texas Legislature. The new provisions of this amendment apply to deficiency actions on foreclosures occurring after April 1, 1991. Without specifying what the prior law in Texas was, the amendment says it does not affect those deficiency actions based

on foreclosures conducted prior to the effective date of the amendment (April 1, 1991).

Mackie recognizes that the entire Bill -- which provides for specific procedures to obtain a determination of fair market value, a new statute of limitations on deficiency suits and a requirement to credit monies received by a lender from private mortgage guaranty insurance -- specifically provides that it applies to deficiency actions instituted after the effective date of the Bill. However, the Bill says that the prior law, as it existed before the Bill, governs earlier deficiency actions (such as the present case). Mackie respectfully urges that said "prior law as it existed" is the latest expressions of the Texas courts where the issue of requiring proof of and use of fair market value of collateral to determine a deficiency, if any, was properly presented and supported by evidence, namely the *Olney*, *Halter*, and *Lee* cases cited above.

The "new" elements, which are available prospectively only are: (i) the specific procedure for determining fair market value, including guidelines for the type of proof to be used; (ii) the new statute of limitations; and (iii) the requirement for giving credit for mortgage insurance proceeds. The Bill in no way conflicts with, but rather bolsters, the recent Texas court pronouncements that basic fairness dictates that a lender should not be allowed to obtain an asset in foreclosure which is, in the "real world", worth as much or more than the debt owed and then be allowed to collect a "deficiency" based on a foreclosure "sale" which everyone realizes by its very nature does not produce a realistic or fair price. Why anyone would suggest that such a windfall to the lender would have ever been fair seems most curious to Mackie. It is Mackie's position that the Texas courts, when presented with that question in a context where proper evidence has been offered to show that the foreclosure "sale" price was not a

realistic fair market price, have rejected any such notion. The Texas appellate courts were not able to decide this question because the FDIC removed this case to the "more friendly federal forum."

It should be understood that Mackie is not questioning the availability of the long-time Texas foreclosure procedure to obtain title to the collateral, and understands and agrees there are good public policy reasons which preserve and approve of this procedure in the absence of evidence showing that irregularities or other elements of unfairness contributed to an inadequate price to such an extent that the foreclosure sale can be set aside. There are no such good policy reasons for allowing a lender to also obtain a windfall in a case where the debtor challenges the existence of a real deficiency and supports that challenge with evidence which raises an issue as to whether, taking into account the real value of the collateral received, there is in fact a real deficiency.

Given: (i) the clear expression of the Texas Legislature to afford borrowers the protection which basic principles of fairness dictate; (ii) the existence of conflicting Texas authority on what the correct rule in deficiency actions was prior to April 1, 1991; (iii) the absence of clear recent Texas Supreme Court authority on this question; (iv) the fact that the principal Texas Supreme Court authority most often relied on by courts wishing to deny a borrower's claim based on inadequate foreclosure price are really grounded in trespass to try title suits which seek to set aside the trustee's sale; and (v) the fact that even those later courts which recognize that rule also state that only slight irregularities need be shown in connection with an inadequate price, Mackie respectfully urges that the irregular circumstances indicated above, including the disclosure in Killeen's own record of its

valuation of the collateral, are sufficient to raise the issue of inadequate consideration as a basis for offset in this case.

B. THE DISTRICT COURT DENIED PETITIONER'S RIGHTS TO A FAIR TRIAL AND A JURY TRIAL BY:

2. Failing to either grant Petitioner's Motion for Judgment Notwithstanding the Verdict returned by the State Court Jury or grant Petitioner a true new trial.

The error of fact and law which the Court of Appeals has made in its Opinion and Order of November 5, 1991 was its affirmance, without opinion, in reliance on Local Rule 47.6, of the complained of action of the District Court and State Court below because, contrary to the requirements of Local Rule 47.6(4), Mackie had demonstrated (in his briefs and argument presented to that Court) that genuine issues of material fact were properly raised by his appeal, which issues were not addressed by the Court of Appeals.

In the trial conducted in the State Court, Mackie was subjected to a jury verdict awarded against him due to: (i) the admittedly erroneous admission of incompetent evidence; (ii) the erroneous exclusion of evidence which Mackie attempted to offer on the fair market value of the foreclosed property; and (iii) the erroneous denial of his Motion for Directed Verdict; all of which occurred against a backdrop of his having to go to trial under protest due to denial of any discovery by him. The State Court's denial of discovery was enforced despite the fact that the sanctions had resulted from unauthorized and unwarranted conduct of Mackie's prior counsel, which deficient conduct had been remedied in full more than a year before the State Court trial began.

Following removal of this case by the FDIC prior to the State Court ruling on post-verdict motions, the second blow to Mackie

came at the District Court below, as a result of the manner in which said court ostensibly remedied the acknowledged error of the State Court. Rather than granting Mackie's Motion for Judgment Notwithstanding the Verdict, or granting his alternative plea for a new trial (the latter of which is the absolute minimum relief to which he was entitled), the court granted a new trial, but in name only. The District Court opened discovery only for the purpose of allowing the FDIC an opportunity to attempt to correct its proof defects on the most elementary aspects of its claim (which it still didn't do until the District Court instructed it how to accomplish the prima facia proof of the amount owing on the note). Then, the District Court, without discussion in either of its opinions, dismissed Mackie's arguments that the fact situation which Mackie had managed to document and otherwise support, despite the unwarranted handicaps imposed upon him, presented a situation which was either: (i) distinguishable from the Court of Appeals' opinion in *Savers Fed. Sav. & Loan Ass'n. v. Reetz*, 888 F.2d 1497 (5th Cir. 1989) and the Texas cases which that opinion had, respectfully, erroneously analyzed; or (ii) was consistent with the most recent Texas cases' view of the propriety of demanding that the fair market value of the foreclosed property be established before a supposed "deficiency" can be asserted, a proposition recently endorsed by an amendment to the Texas Property Code (§51.003, April 1991), which amendment made the matter clear, thus hopefully removing this question from the discretionary power of the courts.

B. THE DISTRICT COURT DENIED PETITIONER'S RIGHTS TO A FAIR TRIAL AND A JURY TRIAL BY:

3. Continuing in effect, over Petitioner's objections, the State Court's order and ruling requiring Petitioner to proceed to trial without benefit of discovery on his affirmative defenses and counterclaims.

The "new trial" which the District Court granted was a new trial in name only. First, it was only as to the FDIC's claims, and did not include the counterclaims of Mackie which were part of the original trial. Secondly, it was a trial in which one party (the FDIC) was afforded a second, and then third chance to correct its proof deficiencies on an essential element of its prima facie case (the amount it claims was owing on the note following foreclosure of its collateral) while the other party (Mackie) was forced to defend himself without the benefit of discovery on matters he asserts are essential to a determination of Killeen's or the FDIC's right to obtain a "deficiency" judgment against him.

Mackie called upon the District Court twice (in his Brief in Support of his Response to the FDIC's Motion for Summary Judgment and in his Motion for Reconsideration and for New Trial to relieve him of the unwarranted handicap which the State Court's Order of September 14, 1987 constituted to his efforts to defend himself and prosecute his counterclaim.

Mackie believes that each of the controlling issues in this case raises a common question: Was the result and the treatment afforded Mackie fair, and that the answer in each instance is "No".

For example: (a) Is it fair for a mortgagee to take legal title to a piece of collateral which its records indicate is worth more than the debt it secures and which it would not sell to a third party for less than the full amount of the debt and then seek to also obtain from the borrower a judgment of almost $400,000?

(b) Is it fair to put a party to trial without benefit of discovery on his affirmative defenses and counterclaims where his former attorney, as opposed to the party himself, admitted to the Court that the failure to timely respond to the adversary's discovery was his (the attorney's) fault and where all discovery requests were complied with in full more than a year before the case came to trial, thus eliminating any possible prejudice to the other party which might have been caused by the lack of an initial timely response? (c) Is it fair to allow a plaintiff to escape a directed verdict which should have been granted against it and then be given a second and third opportunity to try to present ostensibly proper proof of the most basic element of its case, the amount of the claim, while requiring the defendant and counter-plaintiff to operate under the handicap described above?

B. THE DISTRICT COURT DENIED PETITIONER'S RIGHTS TO A FAIR TRIAL AND A JURY TRIAL BY:

4. Awarding, in its summary judgment, attorney's fees against Petitioner where controverting evidence had been presented and a jury trial had been demanded.

Additionally, the District Court awarded the full amount of attorney's fees sought by the FDIC on behalf of its attorneys and Killeen's attorneys, the latter of which had handled the case from inception through the jury verdict in the State Court. This action was taken despite the fact that Mackie presented controverting evidence raising a substantial issue as to the reasonableness of the FDIC's attorney's claims (approximately $28,000 for a team of four lawyers to prepare an unsuccessful Motion for Judgment on the Verdict, a Motion for Summary Judgment [which consisted of a few boiler-plate affidavits attempting to establish the execution of the note and deed of trust, the balance due on the

note, the amount received at foreclosure], and to otherwise respond to Mackie's supposedly "meritless arguments"). The analysis which Mackie presented clearly raised an issue of the reasonableness of the fees sought by the FDIC, not only as respects the services actually rendered by the FDIC's attorneys, but also because of the obvious duplication of work occasioned by the typically wasteful practices evidenced in the government's administration of the "Savings and Loan Bailout," which practices have been consistently endorsed by the current federal judiciary, including the Fifth Circuit.

In response to the FDIC's Memorandum in support of its claim for attorney's fees, and the accompanying Affidavits, Mackie submitted affidavits in contravention. Mackie does not question FDIC's right to removal, but believes that the FDIC is only entitled to recover attorney's fees which are reasonable and necessary, which has not been established. There has been no showing new counsel was needed. The supporting materials submitted on the FDIC's claim for attorney's fees shows a great deal of duplicative time was spent "bringing the new firm up to speed" or else you could not possibly reasonably spend 77 hours of attorneys' time removing the case to Federal Court and marking up a filed Motion for Judgment ($8,742.60 of the FDIC's claim for attorney's fees). Likewise, 95 hours ($12,569.92) to file a Motion for Summary Judgment and Reply Brief to Mackie's Response to that Motion is also clearly excessive. The District Court said Mackie's position was inconsistent since he noted the FDIC only had one disputed issue to establish (rate of interest on note) on its Motion for Summary Judgment, while Mackie contends there were many other fact issues to be determined. Respectfully, there is no inconsistency. The $12,569.92 - 95 hours - was expended by the FDIC in establishing what it perceived to

be the only issue; none of this was spent addressing the other fact issues Mackie says should have been addressed and eliminated as fact issues in order to prevail on summary judgment.

Similarly, it is clearly unfair to charge Mackie with $7,128.23 (58.5 hours) which the FDIC spent in its unsuccessful attempt to persuade the District Court that it should grant the FDIC's original Motion for Judgment based on the State Court trial record and not grant Mackie a new trial. The FDIC attorneys charged 65% as much as the first firm they replaced. The first firm (i) pled the case; (ii) assembled the evidence; (iii) conducted discovery; (iv) tried the case to a jury; and (v) prepared and filed a motion for judgment, for which it charged $44,000.00. Hopkins & Sutter, the FDIC's attorneys (the second firm) charged $28,440.75 to: (i) remove the case to Federal Court; (ii) mark up the pending Motion for Judgment prepared by the first firm; (iii) unsuccessfully argue that a new trial was not called for; and (iv) prepare a Motion for Summary Judgment with defective proof. Multiply this kind of excessive and wasteful expenditure of attorney's fees by the thousands of savings and loan and bank "bailout cases" being prosecuted, and a significant portion of the shameful costs of this "bailout effort" being sanctioned by the federal judiciary is readily identified.

Moreover, if the State Court had not erroneously admitted the incompetent proof of the amount allegedly owing on the Note (an error acknowledged by the District Court), Mackie's Motion for Directed Verdict would have been granted and the entire fee charged by Hopkins & Sutter would have been unnecessary.

The FDIC has stated that it is entitled to have the District Court award attorney's fees based on its four Affidavits (two each for the two firms) since they were clear, direct, positive and free

from contradictions. Assuming, arguendo, this is true, the case it relies on, *Ragsdale v. Progressive Voter's League*, 190 34 Tex. Sup. Ct. J. 255, Tex. Lexis 156 (Dec. 31, 1990), holds this is true only if that evidence is not controverted. Mackie's counsel had contested certain elements as unreasonable in amount or unfair to charge Mackie. As stated above, when a matter is controverted, summary judgment cannot be used to decide the issue and deprive a party of his right to jury trial. The Court's attention is directed to the following from *Ragsdale:*

> Uncontroverted evidence was presented at trial...[regarding] attorney's fees for this cause of action....
>
> * * *
>
> [W]here the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances,...it is taken as true, as a matter of law.
>
> * * *
>
> [W]e do not mean to imply that in every case when uncontradicted testimony is offered it mandates an award of the amount claimed....In order for the court to award an amount of attorney's fees as a matter of law, the evidence from an interested witness must not be contradicted by any other witness or attendant circumstances and the same must be clear, direct and positive, and free from contradiction, inaccuracies and circumstances tending to cast suspicion thereon. (Emphasis added)

II. THE CUMULATIVE EFFECT OF THE ABOVE DESCRIBED ACTIONS OF THE COURTS BELOW VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SEVENTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES BY DEPRIVING HIM OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW AND VIOLATING HIS RIGHTS TO A TRIAL BY JURY AND TO EQUAL PROTECTION OF THE LAWS OF THE STATE OF TEXAS AND THE UNITED STATES OF AMERICA.

Mackie's basic complaint with respect to all of the above is that (1) at the State Court trial there was no competent evidence of an essential element of Killeen's case (the amount due on the note at the time of foreclosure (a) because there was no proper evidence of the interest rate and (b) because the calculations were admittedly made on an acknowledged erroneous provision in the note); (2) Mackie's Motion for Directed Verdict in the State Court trial should therefore have been granted - which would have either ended the matter or put it in a dramatically different appellate posture; (3) for these reasons, as exacerbated by the denial of Mackie's discovery rights, the District Court should have either (a) granted Mackie's Motion for Judgment Notwithstanding the Verdict or (b) granted Mackie's alternative Motion for New Trial and (4) rather than doing either of these, the District Court, perpetuating the unwarranted disadvantage Mackie had been placed under and creating a procedural predicament for Mackie, appeared to grant Mackie a new trial but, in fact, because of the limitations on discovery imposed by its Amended Order of August 22, 1990, only granted the FDIC an opportunity to attempt to correct the evidentiary deficiency in its prima facie case, which it eventually purported to do with its supplemental submission made after the District Court's Opinion and Order of January 8, 1991.

The standard for granting summary judgment is set forth in the following language from *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986):

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. (Emphasis added).

In this connection, every reasonable inference must be indulged in favor of the non-movant and any doubt resolved in his favor. *Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981); *Clark v. West Chem. Prods., Inc.*, 557 F.2d 1155, 1157 (5th Cir. 1977); Wright-Miller-Kane, *Federal Practice & Procedure*, §2725. In §2725, at page 88 of Wright-Miller-Kane, *Federal Practice & Procedure*, it is stated that, when a court is called upon to apply a legal principle in a novel fashion, "a more complete factual record is required and summary judgment ordinarily should be denied if the court has any doubt as to the sufficiency of the movant's showing." At page 97 of said §2725, the Fifth Circuit is listed as among several courts which have held that summary judgment is precluded as long as the slightest doubt remains as to the facts. Finally, in §2714 of Wright-Miller-Kane, at pages 541-43, it is noted that ordinarily the granting of summary judgment will be held to be error when discovery is not yet completed. The circumspect nature of the standard which the moving party is required to

meet, and the contrasting latitude afforded the non-movant to create the necessary impediment to prevent summary judgment, and preserve the non-movant's right to a trial by jury (which Mackie had demanded) are illustrated by the following:

Wright-Miller-Kane, *Federal Practice & Procedure*, §2714:

> [I]n order to assure that this right is protected, the federal courts take great care not to deny the nonmoving party a full trial once it is shown that a genuine issue of fact exists....

Cameron v. Vancouver Plywood Corp., 266 F.2d 535, 540 (9th Cir. 1959):

> It is especially necessary to be cautious in making such a determination [to grant summary judgment] where, as here, a jury trial has been demanded.

Griffeth v. Utah Power & Light Co., 226 F.2d 661, 669 (9th Cir. 1955):

> The trial court was vested with no discretion. The federal Constitution gives a right of jury trial in a contested issue in a law action. This right is positive and should not be whittled away by decision of contested issues by the judge at hearings in camera before trial.

Whitaker v. Coleman, 115 F.2d 305, 306 (5th Cir. 1940):

> Summary judgment...cannot deprive a litigant of, or at all encroach upon, his right to a jury trial. Judges in giving its flexible provisions effect must do so with this essential limitation constantly in mind.

Finally, in *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986), a case relied upon by the District Court, it is stated:

> Absent evidence, direct, circumstantial, or inferential, that would create a genuine issue of fact, and absent any

> suggestion concerning the utility of additional time for further discovery, the motion should be granted. (Emphasis added).
>
> * * *
>
> When everything that can be adduced at trial is before the judge on motion and the parties, while urging conflicting ultimate facts or conclusions, have no evidentiary disputes, a trial serves no useful purpose. (Emphasis added).

Applying the above standards in light of the events that have transpired in this case since the entry of the State Court's Order of September 17, 1987, as described and supported by the exhibits, affidavits and other materials submitted by Mackie in the course of the summary judgment proceedings, it is respectfully suggested that Mackie has in no way been afforded the opportunity to prepare his case or defenses in the manner contemplated in the controlling authorities. The entry of judgment against Mackie, where he has been denied discovery and deprived of a right to a trial by jury, constitutes the taking of property without due process, with the assistance of the state and federal courts, in violation of his rights under the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States of America.

The interest of justice was in no way served by putting Mackie to trial on Killeen's claims and Mackie's counterclaims without allowing Mackie the benefit of any discovery after Mackie had fully complied with all monetary and discovery requirements imposed by the State Court more than a year before the commencement of the trial and where these defaults were acknowledged by Mackie's prior counsel to be the result of his actions rather than Mackie's.

The unfairness accorded Mackie in these proceedings is underscored because, as noted above, by contrast, Killeen, the original Plaintiff, and the FDIC, the successor Plaintiff, were allowed effectively three opportunities to establish an essential element of their case, namely that there is in fact a balance due on the subject note, and the amount of such balance.

Mackie was denied the opportunity to conduct discovery on matters which would affect issues related to: (i) whether there were irregularities or unfair circumstances attending the foreclosure proceedings which resulted in an inadequate price being paid by Killeen for the property - thus creating an alleged deficiency; and (ii) what the fair market value of the property was on the date of foreclosure.

After this case was removed to Federal Court, Mackie reurged the District Court to allow full discovery with respect to matters affecting the proper amount of offset he is entitled to, rather than the limited discovery allowed by the District Court's Amended Order of August 22, 1990, in his Motion for Judgment Notwithstanding the Verdict or, Alternatively, for New Trial filed January 30, 1990, and his Motion for Reconsideration or, Alternatively, for New Trial filed February 8, 1991. All of these unfair actions of the State Court and the District Court were sanctioned by the Court of Appeals in its perfunctory consideration of Mackie's appeal.

As a result of the above, Mackie has been denied the benefit of his Motion for Directed Verdict, which should have been granted, denied an opportunity to conduct full discovery, and denied a jury trial on issues which he has raised by competent summary judgment proof, and thus has been unfairly deprived of property without due process of law, and been denied the equal

protection of the laws of the State of Texas and of the United States of America.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted, the Order of the Fifth Circuit and the Judgment of the District Court vacated, and the case remanded with instructions to either grant Petitioner's Motion for Judgment Notwithstanding the Verdict or to grant Petitioner a full new jury trial on all issues, following an adequate opportunity to conduct full discovery.

Respectfully submitted,

W. Randolph Elliott
Counsel of Record
3608 Harvard Avenue
Dallas, Texas 75205
214/522-3919
214/522-3919* (FAX)
Attorney for Petitioner

CONSTITUTIONAL AMENDMENTS INVOLVED

Amendment V

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Amendment XIV

SECTION 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1292

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS Manager of the FSLIC Resolution Fund,

Plaintiff-Appellee,

versus

THOMAS S. MACKIE, d/b/a Warwick,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING
(December 10, 1991)

Before KING, JOHNSON, and DAVIS, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/W. Eugene Davis
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1292

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS Manager of the FSLIC Resolution Fund,

Plaintiff-Appellee,

versus

THOMAS S. MACKIE, d/b/a Warwick,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(CA-3-89-0247-G)

(November 5, 1991)

Before KING, JOHNSON, and DAVIS, Circuit Judges.

PER CURIAM:*
AFFIRMED. See Local Rule 47.6.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

FDIC, as Manager of the FSLIC Resolution Fund, Plaintiff,	*	
v.	*	
Thomas S. MACKIE, d/b/a Warwick, Defendant and Counter-Plaintiff,	*	Civil Action No. 3-89-0247-H
v.	*	
FDIC, as Manager of the FSLIC Resolution Fund, Counter-Defendant.	*	

JUDGMENT
(Filed February 15, 1991)

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order dated January 8, 1991.

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that the Federal Deposit Insurance Corporation, as Manager of the FSLIC Resolution Fund, as Statutory Successor to the Federal Savings and Loan Insurance Corporation in its Corporate Capacity ("FDIC") have and recover from Thomas S. Mackie the sum of Three Hundred Eighty-Four Thousand Eight Hundred Seventy-Nine and 79/100 dollars ($384,879.79), said sum representing:

(a) a deficiency of $229,764.79 existing on the note as of January 6, 1987, the foreclosure date; and

(b) post-foreclosure interest of $155,115.00 calculated at an 18% default rate from January 7, 1987, to February 15, 1991.

IT IS FURTHER ORDERED that the FDIC is entitled to its reasonable attorneys' fees of $76,440.75 incurred in prosecuting this action.

IT IS FURTHER ORDERED that the foregoing sums shall bear interest at the rate of 6.21% per annum from the date of this Judgment until paid.

All costs of court expended or incurred in this cause are hereby adjudged against Thomas E. Mackie, Defendant. All writs and processes for the enforcement and collection of this Judgment or the costs of court may issue as necessary. All other relief not expressly granted herein is denied.

SIGNED this 15th day of February, 1991.

/s/Barefoot Sanders
BAREFOOT SANDERS, CHIEF JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

FDIC, as Manager of the FSLIC Resolution Fund, Plaintiff,	*	
v.	*	
Thomas S. MACKIE, d/b/a Warwick, Defendant and Counter-Plaintiff,	*	Civil Action No. 3-89-0247-H
v.	*	
FDIC, as Manager of the FSLIC Resolution Fund, Counter-Defendant.	*	

MEMORANDUM OPINION AND ORDER
(Filed February 15, 1991)

Before the Court is Defendant Thomas S. Mackie's Motion for Reconsideration and for New Trial, filed February 8, 1991. By his motion, Mackie requests entry of judgment notwithstanding the verdict in his favor or, alternatively, a grant of "Mackie's Motion for New Trial in full, allowing for full discovery on all matters, including to those relating to Mackie's defenses and counterclaims, and establishing this Court's usual Scheduling Order for amendment of pleadings (which would be required by both parties to conform the pleadings to the present

state of the dispute) and like matters." Mackie's Motion for Reconsideration and for New Trial at 3. In addition, of course, Mackie requests that the Court vacate its previous Order granting the FDIC's motion for summary judgment.

I. Background.

On April 30, 1985, Defendant Thomas S. Mackie executed a note ("the Note") in favor of Killeen Savings and Loan Association, Killeen, Texas ("Killeen") in the amount of $1,388,926.00. At the same time he executed the Note, Mackie executed a Deed of Trust and a Guaranty Agreement. Just eight months later, Mackie defaulted on the Note. On December 15, 1986, Killeen posted the property securing the Note ("the Property") for foreclosure, and sold it to Killeen at a public auction on January 6, 1987 for $1,312,500.00.

In June of 1986, Killeen filed this case in the 101st Judicial District Court of Dallas County, Texas, seeking a deficiency judgment. Mackie asserted various counterclaims. On December 14, 1988, a jury verdict was returned in favor of Killeen for damages and attorneys' fees and against Mackie on his counterclaims. Before judgment on the verdict was entered Killeen was declared insolvent, and the assets at issue in this case were transferred to the FSLIC.

The FSLIC removed the case to this Court on January 24, 1989. On October 29, 1989, the Court recognized the FDIC as the statutory successor to the FSLIC and the proper Plaintiff in this case. On January 10, 1990, the FDIC as Receiver for Killeen and the FDIC as holder of the Note submitted a joint motion for entry of judgment on the jury verdict returned in the State Court action, seeking judgment on the counterclaims and on the Note, respectively. On January 30, 1990, Mackie filed a Motion for Judgment Notwithstanding the Verdict and, Alternatively, for

New Trial. By an Order dated August 21, 1990, the Court dismissed all of Mackie's counterclaims against the FDIC/Receiver and granted Mackie's Motion for New Trial, reopening discovery for the limited purpose of ascertaining evidence of disputed interest rate calculations.

By Memorandum Opinion and Order dated January 8, 1991 the Court granted summary judgment in favor of the FDIC. The Court found that although different means of calculating the interest rate were contained in the Note and the Loan Agreement, the Loan Agreement contained a provision stating that "[i]n the event of a conflict between any of the provisions of the Note, Deed of Trust or this Agreement, the provisions of this Agreement shall control." Loan Agreement ¶ 28. Accordingly, the Court found that the applicable interest rate was that provided by the Loan Agreement, which reads:

> 3. Interest: The Note shall bear interest (Interest) payable as herein provided.
>
> (a) The rate of interest used in computing Interest shall be equal to the lesser of:
>
> (i) The maximum rate allowed by applicable law for a loan of this type, computed on a 365 day year basis; or,
>
> (ii) The greater of:
>
> TWO PERCENT (2%) per annum above the published prime rate charged by REPUBLICBANK OF DALLAS, Dallas, Texas, to its best credit rated commercial borrowers as it may change from time to time, computed on a 360 day year basis; or

> TEN AND ONE-HALF PERCENT (10-1/2%) per annum.

Loan Agreement ¶ 3.

Accordingly, on the basis of undisputed evidence, the Court granted summary judgment for the FDIC.

II. Mackie's Present Motion.

Mackie objects to the Court's findings and the entry of summary judgment against him. Mackie's complaints are several, but are summarized by his request for relief. First, Mackie asks for entry of judgment notwithstanding the verdict. Alternatively, Mackie requests a grant of his "Motion for New Trial in full, allowing for full discovery on all matters, including to those relating to Mackie's defenses and counterclaims, and establishing this Court's usual Scheduling Order for amendment of pleadings (which would be required by both parties to conform the pleadings to the present state of the dispute) and like matters."

In short, Mackie insists on pressing counterclaims that were rejected by the state court at trial (although judgment was not entered on the verdict against him) and by this Court by its Order dated August 21, 1990 and again by its Memorandum Opinion and Order dated January 8, 1991 granting the FDIC's motion for summary judgment. The Court has patiently and thoroughly considered the arguments and authorities presented by Mackie, and finds that his motion for reconsideration and for new trial should be, and it hereby is, **DENIED**.

Mackie also complains of the FDIC's request for attorney's fees. This is not a new complaint. The Court stated in its January 8 Order:

> Mackie also disputes the reasonableness of the attorneys' fees requested by the FDIC, particularly in light

> of the additional expense caused by removal of this action (and the concomitant retention of a second law firm by Plaintiffs). The FDIC had a right to remove this action, and as the prevailing party on the Note has a right to reasonable attorneys' fees, including those incurred by the removal of this case. The award of such fees is particularly appropriate in light of the fact that a considerable portion of those fees are directly attributable to Mackie's exercise of his right to request a new trial in this Court.

Memorandum Opinion and Order dated January 8, 1991, at 6-7. Mackie now argues that the FDIC has not shown "the necessity of removing this action or of hiring new counsel even if removal were shown to be necessary." Mackie's Brief in Support at 8.

Mackie's contention regarding removal is simply frivolous; Mackie might as logically refuse to pay his attorney for filing the present motion inasmuch as it is no more "necessary" than was the FDIC's removal of this action. The same basic logic applies to Mackie's argument regarding the retention of new counsel: although in some sense it may not have been "necessary" to the extent deemed proper by Mackie, given both the change of forum and the substitution of the federal government for Killeen, it is reasonable to say that retaining new counsel was necessary. In any event, Mackie has not shown that either removal or hiring new counsel was done for the purpose of burdening him with extra costs.[1]

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[1]Interestingly, Mackie argues that the attorneys' fees charged in the prosecution of this case after its removal are excessive in part because all the FDIC had to establish was "one disputed fact." W. Randolph Elliot Affidavit at 5. This assertion conflicts with Mackie's contention that there were very many disputed issues remaining after removal, including: the amount due and owing, the

To the extent that Mackie's objections to the FDIC's request for attorney's fees is a motion to strike all requests for fees resulting from the removal of this case and from the hiring of new counsel, that motion is **DENIED**. The Court will determine the amount of reasonable and necessary attorneys' fees to be awarded in this case.

III. Conclusion.

For the reasons stated above, Defendant Thomas S. Mackie's Motion for Reconsideration and for New Trial is **DENIED.**

SO ORDERED.

DATED: February 15, 1991.

/s/Barefoot Sanders
BAREFOOT SANDERS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

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interest rate, whether at the time of the foreclosure Plaintiff believed the Property was worth as much or more than the amount owed on the Note; whether at foreclosure Plaintiff carried the Property on its books at a value greater than the amount owed; whether there were other circumstances showing that the Property was worth more than the amount owed; what the fair market value of the Property was at foreclosure; and whether there was an irregularity at the foreclosure sale rendering it defective.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

FDIC, as Manager of the FSLIC Resolution Fund, Plaintiff,	*	
v.	*	
Thomas S. MACKIE, d/b/a Warwick, Defendant and Counter-Plaintiff,	*	Civil Action No. 3-89-0247-H
v.	*	
FDIC, as Manager of the FSLIC Resolution Fund, Counter-Defendant.	*	

MEMORANDUM OPINION AND ORDER
(Filed January 8, 1991)

Before the Court are Plaintiff FDIC's Motion for Summary Judgment, filed November 9, 1990; Defendant and Counter-Plaintiff Thomas S. Mackie's Response, filed December 14, 1990; and the FDIC's Reply, filed January 4, 1991.

I. Background.

This is a note case. On April 30, 1985 Defendant Thomas S. Mackie executed a note ("the Note") in favor of Killeen Savings and Loan Association, Killeen, Texas ("Killeen") in the amount of $1,388,926.00. At the same time he executed the Note, Mackie executed a Deed of Trust and a Guaranty

Agreement. Eight months later, Mackie defaulted on the Note. On December 15, 1986, Killeen posted the property securing the Note ("the Property") for foreclosure, and sold it to Killeen at a public auction on January 6, 1987 for $1,312,500.00.

In June of 1986, Killeen filed this case in the 101st Judicial District Court of Dallas County, Texas, seeking a deficiency judgment. Mackie asserted various counterclaims. On December 14, 1988, a jury verdict was returned in favor of Killeen for damages and attorneys' fees and against Mackie on his counterclaims. Before judgment could be entered -- Mackie's Motion for Judgment Notwithstanding the Verdict and Killeen's Motion for Judgment on the Verdict were both pending -- Killeen was declared insolvent, and the assets at issue in this case were transferred to the FSLIC.

The FSLIC removed the case to this Court on January 24, 1989. On October 29, 1989, the Court recognized the FDIC as the statutory successor to the FSLIC and the proper Plaintiff in this case.

On January 10, 1990, the FDIC as Receiver for Killeen and the FDIC as holder of the Note submitted a joint motion for entry of judgment on the jury verdict returned in the State Court action, seeking judgment on the counterclaims and on the Note, respectively. On January 30, 1990, Mackie filed a Motion for Judgment Notwithstanding the Verdict and, Alternatively, for New Trial. By an Order dated August 21, 1990, the Court dismissed all of Mackie's counterclaims against the FDIC/Receiver and granted Mackie's Motion for New Trial, reopening discovery for the limited purpose of ascertaining evidence of disputed interest rate calculations.

The FDIC now moves for summary judgment on the Note.

II. Summary Judgment.

Summary Judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. See Fed. R. Civ. P. 56. As the Fifth Circuit stated in Christophersen v. Allied-Signal Corp., 902 F.2d 362, 364 (5th Cir. 1990), "[b]efore a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the plaintiff's case." A movant for summary judgment need not support the motion with evidence negating the opponent's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

"Summary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." Fontenot v. Upjohn Co., 780 F.2d 1190, 1197 (5th Cir. 1986). (reinterpreting Federal Rule of Civil Procedure 56 to enhance judicial economy). The Fifth Circuit has held that the moving party is entitled to summary judgment when the nonmoving party fails to make a sufficient showing of proof, see id. at 195-98, although all evidence must be viewed in the light most favorable to the motion's opponent. See Gremillion v. Gulf Coast Catering Co., 904 F.2d 290, 292 (5th Cir. 1990). Summary judgment may be entered against a party if after adequate time for discovery the party fails to establish the existence of an element essential to his or her case and as to which he or she will bear the burden of proof at trial. See, Celotex Corp. v. Catrett, 477 U.S. at 324-26. "Typically, suits on promissory notes provide fit grist for the summary judgment mill." Federal Deposit Insurance Corp. v.

Cardinal Oil Well Servicing Co., 837 F.2d. 1369, 1371 (5th Cir. 1988).

III. The Note Claim.

In order to make out a prima facie case on the Note under Texas law, the FDIC must establish the Note in question, that the debtors signed the Note, that the FDIC is the legal holder and owner of the Note, and that a certain balance is due and owing on the Note. See Clark v. Dedina, 658 S.W.2d 293, 295 (Tex. App.--Houston [1st Dist.] 1983, writ dism'd w.o.j.) (citing Bailey v. Gulfway National Bank of Corpus Christi, 626 S.W.2d 70, 73 (Tex. App.--Corpus Christi 1981, writ ref'd n.r.e.)); Tex. Bus. & Com. Code Ann. § 3.307(b). The Court finds that the FDIC has met this burden.

In this case, the only dispute raised by Mackie concerns whether the FDIC has established that a certain balance is due and owing on the Note.[1]

Mackie has not raised a genuine issue of material fact as to the amount of the deficiency owed by Mackie, but he has pointed out

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[1]Mackie also contends that the following are fact issues: Whether at the time of the foreclosure Plaintiff believed the Property was worth as much or more than the amount owed on the Note; whether at foreclosure Plaintiff carried the Property on its books at a value greater than the amount owed; whether there were other circumstances showing that the Property was worth more than the amount owed; what the fair market value of the Property was at foreclosure; and whether there was an irregularity at the foreclosure sale rendering it defective. Having reviewed the arguments, authorities, and evidence presented by Mackie regarding these claims, the Court finds that they are without merit and raise no issue of material fact precluding entry of summary judgment in favor of the FDIC.

an incongruity in the FDIC's calculation of the amount of interest due on the Note through the day of foreclosure.

Paragraph 13 of the Dickson Affidavit (Plaintiff's Motion Ex. A) states that the interest calculations contained in the Affidavit were made according to the terms of the Note at issue in this case. According to this version of the interest rate, interest on the Note was to be the RepublicBank Prime Rate, plus 2%, with a maximum rate of 10.5%. The Loan Agreement signed by Mackie, however, states a different interest rate. According to Mackie, in light of this conflict between the Note and the Loan Agreement, "there is no proper evidence before this Court on the amount of interest due on said Note and, therefore, the amount of any deficiency which might be alleged." Defendant's Brief in Response at 6.

Mackie is incorrect. In evidence before the Court is every document necessary to conclusively establish the rate of interest applicable to the amount due under the Note. As Mackie points out, there is a conflict between the interest provisions of the Note and the Loan Agreement. There is a clause in the Loan Agreement, however, that states that "[i]n the event of a conflict between any of the provisions of the Note, Deed of Trust or this Agreement, the provisions of this Agreement shall control." Loan Agreement ¶ 28. Accordingly, the applicable interest rate is that provided by the Loan Agreement, which reads:

> 3. Interest: The Note shall bear interest (Interest) payable as herein provided.
>
> (a) The rate of interest used in computing Interest shall be equal to the lesser of:

> (i) The maximum rate allowed by applicable law for a loan of this type, computed on a 365 day year basis; or,
>
> (ii) The greater of:
>
> TWO PERCENT (2%) per annum above the published prime rate charged by REPUBLICBANK OF DALLAS, Dallas, Texas, to its best credit rated commercial borrowers as it may change from time to time, computed on a 360 day year basis; or
>
> TEN AND ONE-HALF PERCENT (10-1/2%) per annum.

Loan Agreement ¶ 3. In light of paragraph 28 of the Loan Agreement, this provision is dispositive of the interest rate issue.

Mackie also disputes the reasonableness of the attorneys' fees requested by the FDIC, particularly in light of the additional expense caused by removal of this action (and the concomitant retention of a second law firm by Plaintiffs). The FDIC had a right to remove this action, and as the prevailing party on the Note has a right to reasonable attorneys' fees, including those incurred by the removal of this case. The award of such fees is particularly appropriate in light of the fact that a considerable portion of those fees are directly attributable to Mackie's exercise of his right to request a new trial in this Court. Of course, the actual amount of the fees awarded shall be determined by the Court.

IV. Conclusion.

For the reasons stated above, the FDIC's Motion for Summary Judgment is **GRANTED**. The FDIC shall submit a proposed judgment by **noon, January 22, 1991.** Submitted with the proposed judgment shall be affidavits and other appropriate evidence establishing the full amount of attorneys' fees requested in this case.

SO ORDERED.

DATED: January 8, 1991.

/s/Barefoot Sanders
BAREFOOT SANDERS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

FDIC-CORPORATE, Plaintiff	*	
v.	*	
Thomas S. MACKIE, Defendant and Counter-Plaintiff	*	Civil Action No. 3-89-0247-H
v.	*	
FDIC-RECEIVER, Counter-Defendant	*	

AMENDED ORDER
(Filed August 22, 1990)

This Order replaces the similar Order entered in this case on August 21, 1990.

Before the Court are FDICs' Joint Motion for Judgment, and Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial.

As stated at the conference held on August 20, 1990, the Court **DENIES** the motion for judgment notwithstanding the verdict. The Court also **GRANTS IN PART** the joint motion for judgment by dismissing all counterclaims against Counter-Defendant FDIC-Receiver.

Because the Court believes, based upon the transcript of the trial, that Plaintiff failed to establish an essential element of

the verdict -- the accuracy of the interest rate used by Plaintiff -- the joint motion for judgment is **DENIED** as to Plaintiff FDIC-Corporate, and the motion for new trial is **GRANTED.**

Discovery shall be reopened for the limited purpose of conducting discovery on the disputed interest rate calculations. Discovery shall close on **October 26, 1990**. Motions for summary judgment must be filed by **November 9, 1990.** After ruling on the motions, the Court will enter an order establishing further deadlines if necessary.

SO ORDERED.

DATED: August 22, 1990.

/s/Barefoot Sanders
BAREFOOT SANDERS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

NO. 86-8292-E

KILLEEN SAVINGS & LOAN ASSOCIATION	)	IN THE DISTRICT COURT
VS.	)	DALLAS COUNTY, TEXAS
THOMAS S. MACKIE, d/b/a WARWICK	)	101ST JUDICIAL DISTRICT

ORDER

Came on to be heard Plaintiff's Motion to Strike Pleadings and for Sanctions, and after hearing argument of counsel in open court, the statements of Defendant, Thomas S. Mackie, made in open court, considering all prior orders of the Court referred to by Plaintiff in its motion, reviewing the discovery attempted and had by Plaintiff, and after reviewing in detail the other papers in the Court's file, the Court is of the opinion and finds that Defendant, Thomas S. Mackie, abused the discovery process in resisting the discovery efforts of Plaintiff, and, pursuant to Texas Rule of Civil Procedure 215(3), it is accordingly,

ORDERED, ADJUDGED and DECREED that Defendant, Thomas S. Mackie, from the date hereof is disallowed and is prohibited from seeking further discovery of any nature from Plaintiff in furtherance or support of Defendant's Original Counterclaim filed herein originally on June 5, 1987 or in furtherance or support of his affirmative defense of offset set forth in Defendant's First Amended Original Answer filed herein originally on June 8, 1987.

It is further ORDERED, ADJUDGED and DECREED that Defendant pay to Plaintiff on or before the 30th day of

September the sum of $500.00 as reasonable expenses, including attorneys' fees, by delivering said sum in cash or by cashier's check to Plaintiff's attorney of record, Louis H. Altman, at the offices of Baskin & Novakov, 2000 St. Paul Place, 750 N. St. Paul, Dallas, Texas.

SIGNED this 14th day of September, 1987.

/s/ Joseph B. Morris
JOSEPH B. MORRIS
PRESIDING JUDGE
101ST JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

NO. 86-8292-E

KILLEEN SAVINGS & LOAN ASSOCIATION	)	IN THE DISTRICT COURT
VS.	)	DALLAS COUNTY, TEXAS
THOMAS S. MACKIE, d/b/a WARWICK	)	101ST JUDICIAL DISTRICT

(From Pages 4 and 5 of Statement of Facts, December 12, 1988.)

P R O C E E D I N G S

THE COURT: Mr. Altman and Mr. Pullman, approach the bench.

We have our jury panel on the way, gentlemen. Any other pretrial matters to take up?

MR. PULLMAN: Yes, sir, we'd like to read our objections in the record. Mr. Elliot has those, Your Honor.

THE COURT: This is Cause No. 86-8292, Killeen Savings & Loan Association versus Thomas S. Mackie.

Mr. Elliot?

MR. ELLIOT: Thank you, Your Honor. At this time Defendant wishes to object [objects] to being put to trial under the handicaps [handicapped] imposed [supposed] by this Court's order of September 14, 1987 in which this court not only ordered [order] the Defendant to fully comply with Plaintiff's discovery and ordered [order] him to compensate Plaintiff's Counsel for previous delays, but also [to] deprived [deprive] the Defendant of all discovery with respect to his [this] counterclaim and further defenses, [.] thus creating a totally unequal footing, [as] a result which is not justified by whatever offense the Court feels the Defendant has committed in delaying

the Plaintiff's discovery. Presumably any injury to Plaintiff was rectified by the order of compensation of Plaintiff's attorney and the compliance by Defendant with all of the Plaintiff's discovery request more than a year before this case was [is] actually ready to proceed to trial.

To add to that, I believe, depriving the Defendant of all discovery on [of] the counterclaim, [counterclaims] particularly in view [knew] of the statement of Defendant's [Defendant] then Counsel that he, not the Defendant, was responsible for delays in Plaintiff's discovery request, is not justified in our view by the circumstances or [for] the traditional notions of justice [tradition of the sanction notice]. For these reasons, while we intend to comply with the Court's order and proceed to trial under these circumstances, [.] we wish our objections [to object] to said procedure to be noted and that we are proceeding under [in] protest and objection without waiving our later appeal.

THE COURT: Objection is noted. Overruled.

[ ] In original Court Reporter's text, before correction.

Underlined words were added or substituted to make text correct.

1989, 1990 and 1991 FIFTH CIRCUIT CASES INVOLVING FDIC, FSLIC OR RTC

1. C.A.5 (Tex.) 1991. Resolution Trust Corp. v. Montross 944 F.2d 227

2. C.A.5 (Tex.) 1991. Colony Creek, Ltd. v. Resolution Trust Corp. 941 F.2d 1323

3. C.A.5 1991. Resolution Trust v. Daftary 945 F.2d 401 (Table)

4. C.A.5 1991. Harsha v. Resolution Trust 943 F.2d 1313 (Table)

5. C.A.5 (Tex.) Resolution Trust Corp. v. Marshall 939 F.2d 274

6. C.A.5 (La.) 1991. Resolution Trust Corp. v. Sonny's Old Land Corp. 937 F.2d 128

7. C.A. 5 (La.) 1991. Resolution Trust Corp. v. Murray 935 F.2d 89 (Table)

8. C.A.5 1991. Sullivan v. Resolution Trust 937 F.2d 605 (Table)

9. C.A.5 (Tex.) 1991. Federal Deposit Ins. Corp. v. International Property Management, Inc. 929 F.2d 1033, 14 UCC Rep.Serv.2d 1205

10. C.A.5 1991. Resolution Trust v. Kubitschek 927 F.2d 599 (Table)

11. C.A.5 (Tex.) 1990. Matter of Liberty Trust Co. 903 F.2d 1053, 17 Fed.R.Serv.3d 273

12. C.A.5 1990 Resolution Trust Corp. v. Barrack 907 F.2d 148 (Table)

13. C.A.5 (Tex.) 1991. Citizens State Bank of Lometa v. Federal Deposit Ins. Corp. ___ F.2d ___, 1991 WL 208990 (5th Cir. (Tex.))

14. C.A.5 (Tex.) 1991. Federal Deposit Ins. Corp. v. Claycomb ___ F.2d ___, 1991 WL 198997 (5th Cir. (Tex.))

15. C.A.5 (Tex.) 1991. Matter of Dyke 943 F.2d 1435

16. C.A.5 (Tex.) 1991. NCNB Texas Nat. Bank v. Fennell 942 F.2d 934

17. C.A.5 (Tex.) 1991. Federal Deposit Ins. Corp. v. Hamilton 939 F.2d 1225

18. C.A.5 (Tex.) 1991. Federal Deposit Ins. Corp. v. Laguarta 939 F.2d 1231

19. C.A.5 1991. Beeman v. FDIC 942 F.2d 787 (Table)

20. C.A.5 (Tex.) 1991. Garrett v. Commonwealth Mortg. Corp. of America 938 F.2d 591

21. C.A.5 1991. Amberg v. Federal Deposit Ins. Corp. 934 F.2d 681, 60 U.S.L.W. 2059

22. C.A.5 1991. FDIC v. Boyd 936 F.2d 569 (Table)

23. C.A.5 (Tex.) 1991. Clay v. Federal Deposit Ins. Corp. 934 F.2d 69

24. C.A.5 (Tex.),1991. NCNB TEXAS NAT. BANK V. FENNELL 933 F.2d 275

25. C.A.5 1991. FDIC v. Marx 934 F.2d 1261 (Table)

26. C.A.5 (La.) 1991. Federal Deposit Ins. Corp. v. Bank of Coushatta 930 F.2d 1122, 59 U.S.L.W. 2715

27. C.A.5 (Tex.) 1991. Federal Deposit Ins. Corp. v. International Property Management, Inc. 929 F.2d 1033, 14 UCC Rep.Serv.2d 1205

28. C.A.5 (Tex.),1991. ACKERMAN V. FEDERAL DEPOSIT INS. CORP. 930 F.2d 3, 14 UCC Rep.Serv.2d 788

29. C.A.5 1991. Jameson v. Federal Deposit Ins. Corp. 931 F.2d 290, 59 U.S.L.W. 2757

30. C.A.5 1991. Woodline Investments v. Federal Deposit Ins. Corp. 930 F.2d 915 (Table)

31. C.A.5 (Tex.) 1991. Federal Deposit Ins. Corp. v. Lanier 926 F.2d 462, 14 UCC Rep.Serv.2d 346

32. C.A.5 1991. FDIC v. Legrand 929 F.2d 696 (Table)

33. C.A.5 (La.) 1991. Hymel v. Federal Deposit Ins. Corp. 925 F.2d 881, 59 U.S.L.W. 2562, 13 Employee Benefits Cas. 1756

34. C.A.5 (Tex.) 1991. Spawn v. Western Bank-Westheimer 925 F.2d 885

35. C.A.5 1991. FDIC v. Shipwash 928 F.2d 402 (Table)

36. C.A.5 1991. Byrom's Offshore v. FDIC 927 F.2d 601 (Table)

37. C.A.5 1991. Odom v. FDIC 927 F.2d 600 (Table)

38. C.A.5 (La.) 1991. Federal Deposit Ins. Corp. v. City of New Iberia 921 F.2d 610, 59 U.S.L.W. 2475

39. C.A.5 1991. T.C. Joint Venture v. FDIC 923 F.2d 853 (Table)

40. C.A.5 1991. Federal Deposit Ins. Corp. v. Blanton 923 F.2d 851 (Table)

41. C.A.5 1991. Riley v. FDIC 923 F.2d 852 (Table)

42. C.A.5 (Tex.),1990. MATTER OF MEYERLAND CO. 921 F.2d 55

43. C.A.5 (Tex.) 1990. Union Federal Bank of Indianapolis v. Minyard 919 F.2d 335

44. C.A.5 1990. Seidler v. FDIC 922 F.2d 838 (Table)

45. C.A.5 (Tex.) 1990 Lamar Financial Corp. v. Adams 918 F.2d 564, 18 Fed.R.Serv.3d 1095

46. C.A.5 (Tex.) 1990. Federal Deposit Ins. Corp. v. Blanton 918 F.2d 524, 13 UCC Rep.Serv.2d 626

47. C.A.5 (Tex.) 1990. Patterson v. Federal Deposit Ins. Corp. 918 F.2d 540, 59 U.S.L.W. 2374, 13 UCC Rep.Serv.2d 1160

48. C.A.5 1990. Riverside-Airport v. F.D.I.C. 920 F.2d 930 (Table)

49. C.A.5 1990. F.D.I.C. v. Culpepper 920 F.2d 929 (Table)

50. C.A.5 (Tex.) 1990. Federal Deposit Ins. Corp. v. Irwin 916 F.2d 1051, 59 U.S.L.W. 2330

51. C.A.5 (Tex.) 1990. Bowen v. Federal Deposit Ins. Corp. 915 F.2d 1013

52. C.A.5 (Tex.) 1990. Federal Deposit Ins. Corp. v. Connecticut Nat. Bank 916 F.2d 997

53. C.A.5 1990. Allen v. F.D.I.C. 917 F.2d 562 (Table)

54. C.A.5 1990. Lachance v. F.D.I.C. 917 F.2d 561 (Table)

55. C.A.5 (Tex.) 1990. Midland West Corp. v. Federal Deposit Ins. Corp. 911 F.2d 1141, 17 Fed.R.Serv.3d 868

56. C.A.5 (Tex.),1990. FEDERAL DEPOSIT INS. CORP. V. RIGATTI 911 F.2d 1145

57. C.A.5 (Tex.) 1990. Marriott Bros. v. Gage 911 F.2d 1105, RICO Bus.Disp.Guide 7573

58. C.A.5 (Tex.) 1990. Central Nat. Bank of Waco, Tex. v. Federal Deposit Ins. Corp. 910 F.2d 1279

59. C.A.5 (Tex.) 1990. Matter of Meyerland Co. 910 F.2d 1257, 59 U.S.L.W. 2187

60. C.A.5 (Tex.) 1990. Sunbelt Sav., FSB v. Bent Trail Phase IV Joint Venture 907 F.2d 1569

61. C.A.5 (La.) 1990. Federal Deposit Ins. Corp. v. Mmahat 907 F.2d 546, 59 U.S.L.W. 2211, 30 Fed. R. Evid. Serv. 1193

62. C.A.5 (Tex.) 1990. City Nat. Bank v. U.S. 907 F.2d 536

63. C.A.5 (Tex.) 1990. Federal Deposit Ins. Corp. v. Goldberg 906 F.2d 1087

64. C.A.5 (Tex.) 1990. Kilpatrick v. Riddle 907 F.2d 1523, 59 U.S.L.W. 2121

65. C.A.5 (Tex.) 1990. Pernie Bailey Drilling Co. v. Federal Deposit Ins. Corp. 905 F.2d 78

66. C.A.5 1990. Farr v. FDIC 904 F.2d 703 (Table)

67. C.A.5 (Tex.) 1990. Campbell Leasing, Inc. v. Federal Deposit Ins. Corp. 901 F.2d 1244, 12 UCC Rep.Serv.2d 138

68. C.A.5 (Tex.) 1990. Federal Deposit Ins. Corp. v. Nobles 901 F.2d 477, 11 UCC Rep.Serv.2d 893

69. C.A.5 (Tex.) 1990. Abdulla Fouad & Sons v. Federal Deposit Ins. Corp. 898 F.2d 482, 58 U.S.L.W. 2650

70. C.A.5 (Tex.) 1990. Federal Deposit Ins. Corp. v. Bennett 898 F.2d 477, 16 Fed.R.Serv.3d 331

71. C.A.5 1990. FDIC v. Weinacht 901 F 2d 1111 (Table)

72. C.A.5 (Tex.) 1990. Blanco, Inc. v. Porras 897 F.2d 788

73. C.A.5 1990. FDIC v. Parker 898 F.2d 151 (Table)

74. C.A.5 1990. Thurman v. Federal Deposit Ins. Corp. 894 F.2d 1335 (Table)

75. C.A.5 (Tex.) 1989. Federal Deposit Ins. Corp. v. Woolard 898 F.2d 1477, 57 Ed.Law Rep. 363

76. C.A.5 (Tex.) 1989. Federal Deposit Ins. Corp. v. Yancey Camp Development 889 F.2d 647, 15 Fed.R.Serv.3d 1027

77. C.A.5 (Tex.) 1989. Thurman v. Federal Deposit Ins. Corp. 889 F.2d 1141, 15 Fed.R.Serv.3d 546

78. C.A.5 (Tex.) 1989 Carrollton-Farmers Branch Independent School Dist. v. Johnson & Cravens 889 F.2d 571

79. C.A.5 1989. Federal Deposit Ins. Corp. v. Republicbank, Lubbock, N.A., Lubbock, Texas 890 F.2d 1164 (Table)

80. C.A.5 (Tex.) 1989. Federal Deposit Ins. Corp. v. Republicbank, Lubbock, N.A., Lubbock, Tex. 883 F.2d 427

81. C.A.5 (La.) 1989. Grace-Cajun Oil Co. v. Fed. Dep. Ins. Corp. 882 F.2d 1008

82. C.A.5 1989. Bullion v. Federal Deposit Ins. Corp. 881 F.2d 1368

83. C.A.5 (Tex.) 1989. U.S. v. Federal Deposit Ins. Corp. 881 F.2d 207

84. C.A.5 (Tex.) 1989. Amerifirst Properties, Inc. v. Federal Deposit Ins. Corp. 880 F.2d 821, 58 U.S.L.W. 2119, 1989-2 Trade Cases P 68,711

85. C.A.5 1989. Arnold v. FDIC 881 F.2d 1074 (Table)

86. C.A.5 1989. Spriggins v. Federal Deposit Ins. Corp. 881 F.2d 1071 (Table)

87. C.A.5 (Tex.) 1989. Liberty Bank v. Talman Home Mortg. Corp. 877 F.2d 400

88. C.A.5 1989. Spriggins v. F.D.I.C. 877 F.2d 970 (Table)

89. C.A.5 (Tex.) 1989. Federal Deposit Ins. Corp. v. Texarkana Nat. Bank 874 F.2d 264, 58 U.S.L.W. 2026

90. C.A.5 (Tex.) 1989. Federal Deposit Ins. Corp. v. Lake Country Nat. Bank 873 F.2d 79

91. C.A.5 (Tex.) 1989. Beighley v. Federal Deposit Ins. Corp. 868 F.2d 776, 13 Fed.R.Serv.3d 322

92. C.A.5 1989. F.D.I.C. v. W. Hugh Meyer & Assoc., Inc. 871 F.2d 121 (Table)

93. C.A.5 (Tex.) 1989. Matter of CTS Truss, Inc. 868 F.2d 146, 57 U.S.L.W. 2610, 20 Collier Bankr.Cas.2d 1292, 19 Bankr.Ct.Dec. 391, Bankr. L. Rep. P 72,835

94. C.A.5 (Tex.) 1989. Templin v. Weisgram 867 F.2d 240

95. C.A.5 (Tex.) 1989. F.D.I.C. v. W. Hugh Meyer & Associates, Inc. 864 F.2d 371, 7 UCC Rep.Serv.2d 1179

96. C.A.5 1989. FDIC v. CLR Partnership 866 F.2d 1418 (Table)

1989, 1990 AND 1991 FIFTH CIRCUIT CASES DECIDED ADVERSELY TO FDIC, FSLIC OR RTC

1. Garrett v. Commonwealth Mortg. Corp. of America, 938 F.2d 591 (5th Cir. 1991)

The FDIC's motion to dismiss on the basis of the D'Oench Doctrine was held to be premature.

2. Matter of Liberty Trust Co. 903 F.2d 1053 (5th Cir. 1990)

RTC not allowed a reversal of summary judgment granted against predecessor who failed to file any response to motion for summary judgment.

3. Federal Deposit Ins. Corp. v. Laguarta, 939 F.2d 1231 (5th Cir. 1991)

Existence of fact issue prevented entry of motion for summary judgment in favor of FDIC on D'Oench Doctrine where agreement alleged to be breached was part of loan documents expressly connected by written agreement.

4. Amberg v. Federal Deposit Ins. Corp., 934 F.2d 681 (5th Cir. 1991)

FDIC did not have power to establish jurisdictional default date where no statute gave such rule making power to FDIC.

5. Spawn v. Western Bank-Westheimer, 925 F.2d 885 (5th Cir. 1991)

FDIC not entitled to summary judgment where FDIC had not filed an answer to complaint and only evidence on record established existence of fact issue.

6. Patterson v. Federal Deposit Ins. Corp., 918 F.2d 540 (5th Cir. 1990)

FDIC's rights under 12 U.S.C. Section 1823(e) do not supersede homestead rights granted under Texas Constitution.

7. Federal Deposit Ins. Corp. v. Woolard, 889 F.2d 1477 (5th Cir. 1989)

FDIC not entitled to construe guaranty which was expressly limited to "that one certain promissory note" as a continuing guaranty relating to other obligations.

8. Federal Deposit Ins. Corp. v. Republicbank, Lubbock, N.A., 890 F.2d 1164 (5th Cir. 1989)

Recorded deed of trust not subject to statute invalidating secret agreements by a bank, and FDIC could not avoid effect thereof.

9. Grace-Cajun Oil Co. v. Fed. Dep. Ins. Corp., 882 F.2d 1008 (5th Cir. 1989)

FDIC not entitled to construe security agreement, which pledged property, as a transfer of title to property to bank.

10. Amerifirst Properties, Inc. v. Federal Deposit Ins. Corp., 880 F.2d 821 (5th Cir. 1989)

Agreement to fund loan held to be an extension of credit under antitying provisions of Bank Holding Company Act Amendment.

11. F.D.I.C. v. W. Hugh Meyer & Associates, Inc., 864 F.2d 371 (5th Cir. 1989)

FDIC not entitled to claim benefit of lien which requires possession of collateral where FDIC or its predecessor never had possession of collateral.

SECTION 51.003 TEXAS PROPERTY CODE
(Effective April 1, 1991)

Sec. 51.003. DEFICIENCY JUDGMENT. (a) If the price at which real property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section.

(b) Any person against whom such a recovery is sought by motion may request that the court in which the action is pending determine the fair market value of the real property as of the date of the foreclosure sale. The fair market value shall be determined by the finder of fact after the introduction by the parties of competent evidence of the value. Competent evidence of value may include, but is not limited to, the following: (1) expert opinion testimony; (2) comparable sales; (3) anticipated marketing time and holding costs; (4) cost of sale; and (5) the necessity and amount of any discount to be applied to the future sales price or the cashflow generated by the property to arrive at a current fair market value.

(c) If the court determines that the fair market value is greater than the sale price of the real property at the foreclosure sale, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any claim, indebtedness, or obligation of any kind that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price. If no party requests the determination of fair market value or if such a request is made and no competent evidence of fair market

value is introduced, the sale price at the foreclosure sale shall be used to compute the deficiency.

(d) Any money received by a lender from a private mortgage guaranty insurer shall be credited to the account of the borrower prior to the lender bringing an action at law for any deficiency owed by the borrower. Notwithstanding the foregoing, the credit required by this subsection shall not apply to the exercise by a private mortgage guaranty insurer of its subrogation rights against a borrower or other person liable for any deficiency.

SECTION 2. This Act applies to an action to recover a deficiency resulting from a foreclosure sale that is conducted on or after the effective date of this Act. An action to recover a deficiency resulting from a foreclosure sale that is conducted before that date is governed by the law as it existed on the date of the sale, and the prior law is continued in effect for that purpose. This Act in no way impairs the existing ability of a private mortgage guaranty insurer to exercise its subrogation rights against any person liable for deficiency.

(2)

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No. 91-1443

In the Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS S. MACKIE, DBA WARWICK, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, MANAGER OF FSLIC RESOLUTION FUND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner had a fair opportunity to present his case before the court of appeals and the district court.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals, Pet. App. 3, is unpublished, but the decision is noted at 948 F.2d 1285 (Table). The opinion of the district court, Pet. App. 12-18, is unreported. The opinion of the district court on rehearing, Pet. App. 6-11, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1991. A petition for rehearing was denied on December 10, 1991. Pet. App. 2. The petition for a writ of certiorari was filed on March 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 30, 1985, petitioner executed a promissory note (note), guaranty agreement, loan agreement, and a deed of trust in connection with a loan made by Killeen Savings and Loan Association (Killeen Savings) in the principal amount of $1,388,926. The loan agreement provided for a note to be executed with an interest rate equal to the *lesser* of (a) the maximum allowed rate or (b) "The *greater* of" two percent above the published prime rate charged by RepublicBank of Dallas, or 10.5% per annum. The note, which was subsequently executed, deleted the "greater of" language contained in the loan agreement. The loan agreement stated, however, that "[i]n the event of a conflict between any of the provisions of the Note, Deed of Trust or this Agreement, the provisions of this Agreement shall control." Pet. App. 16-17.

On January 1, 1986, petitioner defaulted on the note. Six months later, on June 27, Killeen Savings filed suit in Texas state court against petitioner seeking to recover the amounts due on the note and alleging fraud and breach of fiduciary duty. On December 12, 1986, Killeen Savings appointed a substitute trustee to act under and by virtue of the deed of trust. Three days later, Killeen Savings gave notice of the foreclosure sale of the property securing the note. On January 6, 1987, the substitute trustee sold the property pursuant to the deed of trust's terms at a public sale for $1,312,500. Petitioner filed a counterclaim, alleging that Killeen Savings had failed to bid the property's full market value at the foreclosure sale.

Petitioner sought to offset the amount of his counterclaims against the amount that he owed on the note.[1]

On August 17, 1987, the Texas state court entered sanctions in the amount of $500 against petitioner, and further ordered him to comply with Killeen Savings' discovery requests. On September 14, 1987, after petitioner failed to comply with that order, the Texas state court imposed discovery sanctions pursuant to Texas R. Civ. P. 215(3), prohibiting petitioner "from seeking further discovery of any nature from [Killeen Savings] in furtherance or support of [petitioner's] Original Counterclaim." Pet. App. 21-22.[2] The order imposing sanctions did not bar petitioner from conducting discovery related to Killeen Savings' claims on the note.

Killeen Savings' claims on the note were tried before a jury in December 1988. On December 14, the jury returned its verdict in favor of Killeen Savings.

2. On December 27, 1988, the Federal Home Loan Bank Board declared Killeen Savings insolvent and appointed the Federal Savings and Loan Insurance Corporation as receiver (FSLIC/Receiver). The FSLIC/Receiver sold its rights under the note to FSLIC in its corporate capacity, but retained the liability, if any, for petitioner's counterclaims. On January 24, 1989, the FSLIC/ Receiver intervened in this case and removed it to the United States District

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[1] Specifically, petitioner alleged violations of the Texas Deceptive Trade Practices-Consumer Protection Act, wrongful foreclosure, failure to conduct foreclosure in a commercially reasonable manner, unjust enrichment, and intentional infliction of emotional distress. He also asserted a usury claim and sought a declaratory judgment.

[2] In addition, the Texas state court ordered petitioner to pay Killeen Savings $500, representing its expenses incurred in obtaining the sanctions.

Court for the Northern District of Texas. On October 12, 1989, the Federal Deposit Insurance Corporation (FDIC) substituted itself for the FSLIC.[3]

On January 10, 1990, the FDIC, as receiver for Killeen Savings and in its corporate capacity as manager of the FSLIC Resolution Fund, moved for the entry of judgment against petitioner. On January 30, petitioner filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial in district court. On August 22, the district court granted in part the FDIC's motion to dismiss petitioner's counterclaims. The court ruled, however, that the FDIC had failed conclusively to establish the appropriate interest rate to be applied. The court therefore denied the FDIC's motion for the entry of judgment and reopened discovery on the limited issue of the appropriate rate of interest on the note. Pet. App. 19-20.

The FDIC later moved for summary judgment, which the district court granted. The court rejected petitioner's claim that there was no evidence showing the amount of interest due on the note. Pet. App. 16. The court found that the documents in the record showed that the interest rate was to be calculated according to the terms of the loan agreement, rather than the terms of the note. *Ibid.*[4] Thereafter, the

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[3] The Federal Deposit Insurance Corporation (FDIC) later assumed FSLIC's role as receiver for Killeen Savings pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, §§ 401-406, 103 Stat. 354-363. Accordingly, the FDIC is the respondent in this action, and all further references in this brief will be to the FDIC.

[4] The district court also found that petitioner had failed to raise a genuine issue of material fact regarding several matters: (1) whether, at the time of foreclosure, Killeen Savings

district court denied petitioner's motion for reconsideration and for a new trial. *Id.* at 9. The district court also awarded the FDIC attorneys' fees, finding the request reasonable. *Id.* at 10.

3. The court of appeals summarily affirmed without opinion. Pet. App. 3.

ARGUMENT

1. Petitioner contends that by summarily disposing of his appeal without issuing an opinion the court of appeals did not adequately consider his arguments. Pet. 10-11. Appellate courts, however, have "wide latitude in their decisions of whether or how to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). Requiring appellate courts to write a full opinion in every case would squander scarce judicial resources. In light of the large number of cases that come before the courts of appeals, it is not surprising that the circuits have adopted local rules that authorize the use of unpublished summary dispositions. Yet, "[t]he fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983). See also *NLRB* v. *Amalgamated Clothing Workers, Local 990*, 430 F.2d 966, 971 (5th Cir. 1970); *United States* v. *Cal's Tupelo Blossom U.S. Fancy*

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believed the property to be worth more than the amount owing on the note; (2) whether, at the time of foreclosure, Killeen Savings carried the property on its books at a value greater than the amount owed; (3) whether other circumstances showed the property to be worth more than the amount owed; (4) what was the fair market value of the property at the time of foreclosure; and (5) whether there were irregularities at the foreclosure sale, rendering it void. Pet. App. 15 n.1.

Pure Honey, 344 F.2d 288, 289 (6th Cir. 1965) ("it is not the policy or practice of this court, in reviewing cases on appeal where a District Court has rendered a comprehensive opinion with which we find ourselves in full agreement, to rewrite such an opinion"). Here, petitioner was afforded a trial by jury in state court, review by a district court, and full briefing and argument in the court of appeals. Petitioner has received his day in court.

2. Petitioner's next contention—that he did not receive a fair trial—consists of three claims: (1) Killeen Savings did not realize the full market value of the property at the foreclosure sale, Pet. 12-19; (2) the Texas state court erred in imposing sanctions against him which prevented him from conducting discovery on his counterclaims, Pet. 20; and (3) the evidence presented by the FDIC to the district court did not establish the amount of the deficiency, Pet. 20-21, 25-29. Each claim lacks merit.

a. Petitioner's first contention—that he was entitled to rely on the fair market value of the property to contest the amount Killeen Savings received at the foreclosure sale—ignores well-settled case law that evidence of the value of real property securing an indebtedness, which has been properly sold at public sale, does not raise an issue of fact as to the proper amount of offset to the indebtedness. Under applicable Texas law,[5] only the amount received at the sale is to

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[5] Effective April 1, 1991, the Texas legislature amended Chapter 51 of the Texas Property Code. The amendment allows a debtor to challenge the amount of a deficiency remaining after a foreclosure sale by introducing evidence of the fair market value of the foreclosed property. The new law, however, is prospective only. The Act states that an "action to recover a deficiency resulting from a foreclosure sale that is conducted before [the Act's effective date] is governed by the

be credited on the debt absent irregularities in the foreclosure sale contributing to the allegedly inadequate price. *Savers Fed. Sav. & Loan Ass'n* v. *Reetz*, 888 F.2d 1497, 1503 (5th Cir. 1989) (Texas law is well settled that inadequacy of foreclosure sale price cannot alone invalidate an otherwise valid foreclosure); *Tarrant Sav. Ass'n* v. *Lucky Homes, Inc.*, 390 S.W.2d 473 (Tex. 1965); *Greater Southwest Office Park, Ltd.* v. *Texas Commerce Bank*, 786 S.W.2d 386, 390 (Tex. Ct. App. 1990). In any event, there is no evidence to suggest that the sale price was unreasonable. Petitioner failed to raise a genuine issue of material fact regarding the amount due on the note.

b. Petitioner's next claim is that the Texas trial court erred in entering sanctions against him and that the district court erred in failing to vacate those sanctions, thereby preventing him from conducting discovery on his counterclaims. That argument also lacks merit. Petitioner failed to raise this claim in district court and therefore has waived his claim. See *Clark* v. *Aetna Casualty & Sur. Co.*, 778 F.2d 242, 249 (5th Cir. 1985) (collecting cases).[6] In addition, upon removal a federal district court takes a state court action as if everything done in state court had in fact

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law *as it existed* on the date of the sale, and the prior law is continued in effect for that purpose." Tex. H.B. No. 169 § 2 (emphasis added). The new law became effective three years after the foreclosure sale at issue here and therefore does not apply to this case. H.B. No. 169, 72d Leg., Regular Sess., 1991 Tex. Gen. Laws 39.

[6] Although petitioner had objected in state court to the denial of complete discovery, petitioner never moved to vacate or modify the state court's sanctions order. The first indication in the record that petitioner informed the district court about his payment of fees in state court came after the district court had entered summary judgment against petitioner.

been done in federal court. *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423, 436 (1974). Thus, the sanctions order can be treated as having been entered by the district court under Fed. R. Civ. P. 37(b)(2). District courts have broad latitude in ordering sanctions under that Rule, and their decisions should be reviewed only for an abuse of discretion. *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976).

c. The FDIC presented sufficient proof of each element to enforce payment of a promissory note under Texas law.[7] Because the FDIC established the amount of interest due and since petitioner presented no contrary evidence, the district court properly granted summary judgment for the FDIC. See *Celotex* v. *Catrett*, 477 U.S. 317 (1986). Petitioner also has not shown that the district court abused its discretion in limiting the scope of discovery, after granting a new trial, on the issue of the appropriate interest rate.

3. Petitioner also contends that the district court erred in its calculation of the amount of attorneys' fees due to the FDIC. Pet. 21-24. Petitioner has not presented that claim to this Court as a question for the Court to resolve, however, and the Court thus should not reach out to address it. See *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1532-1534 (1992). In any event, petitioner's fact-bound claim does not warrant further review. The granting or computation of attorneys' fees is committed to the sound discretion of the district court; such an award is reviewed only for

[7] Those elements are (1) the maker of the note signed an instrument with a promise to pay; (2) the plaintiff is the legal owner of the instrument; and (3) a sum certain is due and owing on the instrument. *Clark* v. *Dedina*, 658 S.W.2d 293, 295 (Tex. Ct. App. 1983).

errors of law and such gross miscalculations indicating that the court has abused its discretion. See, *e.g.*, *Thomas* v. *Sams*, 734 F.2d 185, 193 (5th Cir. 1984). Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 562 (1988). Here, the FDIC submitted detailed affidavits showing that it had incurred reasonable and necessary attorneys' fees. As the district court noted, the FDIC's request for fees as well as the FDIC's retention of new counsel was reasonable "given both the change of forum and the substitution of the federal government for Killeen [Savings]." Pet. App. 10. In sum, the district court properly exercised its discretion in awarding attorneys' fees to the FDIC.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

FDIC, As Manager of the
FSLIC RESOLUTION FUND,

Respondent.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The
Fifth Circuit

REPLY BRIEF OF PETITIONER

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Fifth Circuit

REPLY BRIEF OF PETITIONER

RESPONSE TO "QUESTION PRESENTED" SECTION

Respondent recasts the Questions petitioner presented to limit the supposed relevant question to "whether petitioner had a fair opportunity to present his case to the court of appeals and the district court."

To determine the answer to this suggested "ultimate question" you must examine: (i) the cumulative effect of restrictions placed on petitioner and extra opportunities granted respondent's predecessor at the state/district court level; and (ii) the perfunctory and seemingly incomplete review accorded petitioner's appeal by the appellate court.

For details on the perfunctory review accorded petitioner by the Court of Appeals, this Court is respectfully referred to pages 9 through 11 of Petitioner's Petition for Writ Certiorari ("Petition"). Details on the prejudicial treatment of Petitioner by the state and district court which deprived petitioner of a fair trial, through rulings and other actions, (which not only substantially departed from the accepted and usual course of judicial proceedings but also violated petitioner's rights under the Fifth, Seventh and Fourteenth Amendments) appear at pages 11 through 30 of said Petition.

RESPONSE TO "STATEMENT" SECTION
Petitioner's Compliance With Sanctions Order

Regarding the notations on page 3 of the Response regarding monetary sanctions entered against Petitioner and discovery deficiencies, this Court is respectfully referred to the following unchallenged passage from the Petition, at page 18:

> The State Court's denial of discovery was enforced despite the fact that the sanctions had resulted from unauthorized and unwarranted conduct of Mackie's prior counsel, which deficient conduct had been remedied in

full more than a year before the State Court trial. (Emphasis added)

Respondent also notes on page 3 that the State Court order "did not bar petitioner from conducting discovery related to Killeen Savings claims on the note." It was little comfort to petitioner that he could conduct discovery on the elements which Killeen had to establish: amount of note, amount paid on note, amount due - but could not conduct discovery on the only questions of importance to him - the facts on matters which might bar or reduce or completely offset the amount which might otherwise be owing under the note.

District Court's Error of Law on Material Issues

At footnote 4, page 4 of the Response, it is noted that the district court "found that petitioner had failed to raise a genuine issue of material fact regarding several matters: [five listed issues]." The district court did not hold there was insufficient summary judgment evidence; rather it erroneously concluded that, as a matter of law, these issues, if resolved in petitioner's favor, would not constitute defenses to the enforcement or collection of the note. Details regarding this error of law, perpetuated by the Court of Appeals, appear at pages 9 through 18 of the Petition.

RESPONSE TO "ARGUMENT" SECTION

Action of Court of Appeals

At page 5 of the Response, an attempt is made to reduce petitioner's complaint regarding the Court of Appeals' treatment of his appeal to a complaint that no opinion was written. As is explained in more detail at pages 9 through 11 of the Petition

and pages 25 through 35 of the appendix portion of the Petition, it was the lack of understanding of petitioner's positions on critical issues, as demonstrated by statements of the panel at oral argument combined with the rapid decision and lack of written opinion, which are relied on to demonstrate that the Court of Appeals treated this case as it has virtually all others involving federal financial regulatory agencies: uphold the government's position unless it involved a clear error that could not be rescued by a sympathetic court.

Order Limiting Petitioner's Discovery Rights

At page 7 of the Response, it is asserted that by failing to separately move to modify or vacate the State Court order limiting discovery, petitioner waived any complaint regarding same. In the same section it states first, at footnote 6 that there is no indication in the record that the district court was informed about the payment of sanction ordered until petitioner's motion for new trial and then continues on the same page to note correctly that everything done in state court is deemed to be done by district court (which presumably would include knowledge of the statement made as part of the record at the beginning of the State Court trial regarding full compliance with discovery deficiencies and payment of attorneys fees more than a year before case proceeded to trial (See App. pp 23-24, Petition.)

Also, this Court is respectfully referred to the following unchallenged passage from page 20 of Mackie's Petition herein:

> Mackie called upon the District Court twice (in his Brief in Support of his Response to the FDIC's Motion for Summary Judgment and in his Motion for Reconsideration and for New Trial) to relieve him of the unwarranted handicap which the State Court's Order of September 14, 1987 constituted to his efforts to defend himself and prosecute his counterclaim.

Finally, it is obvious the district court was aware of the State Court Order, and wrongfully chose to continue it in effect, by the otherwise unexplainable language in its Amended Order of August 22, 1990 (Append. pp. 19-20, Petition):

> Discovery shall be reopened for the limited purpose of conducting discovery on the disputed interest rate calculations.

Denial of Petitioner's Right to Jury Trial on Attorneys' Fees

At page 8 of the Response, it is suggested that since this was not presented as a separate question, this court need not decide it. This is, of course, wrong. The complaints regarding the errors of law made by the courts below on the attorney's fees question is one of four illustrations of the district court actions which were affirmed summarily by the Court of Appeals, which demonstrate the extent to which petitioner was denied a fair trial (part of petitioner's first question). The proper amount of attorney's fees to be awarded is also one of the matters with respect to which petitioner was:

> denied a jury trial on issues which he has raised by competent summary judgment proof, and thus has been

> unfairly deprived of property without due process of law, and been denied the equal protection of the laws of the State of Texas and of the United States of America.

which quote appears pages 29 through 30 of the Petition as part of Petitioner's second question presented. This is therefore an important element of petitioner's claim which should be addressed by this Court.

CONCLUSION

For the reasons stated herein, and in the Petition, the Petition should be granted.

Respectfully submitted,

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